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THE
CASE
OF
Sir EDWARD HALES, Baronet.
Being an
EXACT ACCOUNT
OF THE
TRYAL
UPON AN
ACTION
Of 500 Pound brought against him, with his Plea thereto,
UPON THE
KING'S
Dispensing with the *Stat. 25. Car. II.* and the Opi-
nion of the Judges thereupon.

L O N D O N,
Printed for J. Watts, MDCLXXXIX.

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CASE
OF
ST. EDWARD HALL & SONS
vs
THE
TRIAL
ACTION
UPON THE
KINGS

Of 500 Pound brought against him with his wife & children
UPON THE
KINGS

Printing with the press of the Court and the Office
men of the Judges thereupon.

LONDON
Printed for R. B. and M. D. XXXVII

ARGUMENTS

UPON

Sir Edward Hale's

CASE, BARONET.

On an Action of 500 Pound brought against him, with his Plea thereto, upon the King's Dispensing with the Stat. 25. Car. II. and the Opinion of the Judges thereupon.

Ter. Trinity. 2^o. Jacob. Secundi Regis.

Godwin *versus* Sir EDWARD HALES, Baronet.

THE Plaintiff brought an Action of Debt against the Defendant for 500 Pound, and declares the Defendant was admitted such a day to be Lieutenant of a Foot Company; which Office the Plaintiff avers to be an Office of Trust, within the 25. Car. II. and that the Defendant held the same Office for above 3 Months, and he did neither in the next Term, nor 3 Months after the grant of the said Office, take the several Oaths, nor Subscribe the Declaration, according to the said Statute, and yet he did continue in the said Office; and that the Defendant, at the Assizes held at Rochester, was Indicted for neglecting to take the said Oaths,

and there was *Legitimo Modo Convictus*, as by record of his Commission may more fully appear; and the *Plaintiff* entitles himself to the Sum of Five hundred pound forfeiture, given by the Statute to any that will Sue for the same.

To this the *Defendant* Pleads, that the King after his admission into the said Office, and before three Months were ended, did by his Letters Patents Dispencc with, Pardon, and Discharge the *Defendant* from taking the Oaths, and Subscribing the Declaration, according to the Statute, and off and from all Crimes and Convictions incurred, or to be incurred, by the virtue of the said Statute, and that the King did grant to the *Defendant*, that he should hold the said Office, as though the Statute had never been made.

To this Plea in Bar the *Plaintiff* Demurred, and the *Defendant* joined in the Demur.

The Questions are two, 1. Whether the *Defendant* ought to have pleaded this Pardon and Dispensation to the Indictment, or whether he may not plead it in Bar to the Action?

2. Admitting he may plead it to the Action, whether it be a good Bar, and whether the King by his Prerogative may dispense with the Statute?

1. Point.

Mr. Northey, who argued for the *Plaintiff*, held that the *Defendant* may not be permitted to plead this Matter in Bar of the Action, because he ought to have pleaded it to the Indictment, and he having not pleaded it then, the Law will construe it to be waving of it, as the Case in *Brooks Abridgment*, Charter of Pardon, 15°. That in Case of an Indictment for Murther, one that has pleaded not Guilty, cannot plead the pardon after, unless dated since this Plea of not Guilty. So 3°. *Crooke*, and 4°. in a *Fire Facias*, if the *Defendant* appears, and has a Release, and does not plead it, he has lost the benefit of it, and shall not be released, by *Audita Quæta*; now the *Defendant* shall not be permitted to plead it against the *Plaintiff*, no more than he could have pleaded it against the King; for this Action is in the nature of an Execution upon a Judgment, and may be likened to this Case; an Administrator *de foin non*, by 17°. *Car. Secundi* 2. is enabled to sue forth Execution upon a Judgment, recovered by an Executor of the first Testator, and the Statute doth put the Administrator in the same Case as the Executor was; and the *Defendant* in that Case can alledge no other matter against the Administrator, than he could have done against the Executor, neither can he avoid this Execution by any Plea that he might have pleaded to the First Action: And if this *Defendant* shall be received to plead this Plea now, he will

will falsifie the Indictment, that was found against him ; for if the offence be pardoned, he ought not to have been Indicted : but admit this Defendant may well plead this Plea, yet I hold it no Bar to the Plaintiff's Action.

I do allow that the King may Dispense with several Penal Laws ^{2. Point.} in some Cases, but that Prerogative of the King is bounded, so that with some Statutes he cannot Dispense, as wherein the Subject is interessed, as in *4^o. Instit.* (135) So the King cannot License a Man to make a Nuisance or Commit a Murther, as *11^o. Henry 7th. 11. 12.* And that this is an Act wherein all the Subjects have an Interest, I humbly submit to the Judgment of the Court.

The King cannot Dispense with the Statute *31 of Eliz. Cha. 6.* against Simony, nor with the Statute *17 Edw. 6. 1.* against Buying and Selling of Offices, as appears by the *1^o. Instit. 12^o. a. 30. Instit. 154. 20. Crooke 385. Hobart 75. 1^o. Instit. 234. a.* A Man that is Disabled by Law to take such an Office, the King cannot Capacitate him ; as if the King should grant to one to sell an Office, within the Statute *Ed. 6^o.* and to another to buy that Office, these Grants would be void, as in *Vaughan 534.* in the Case of *Thomas and Sorrel*, there are several Cases pur, wherein the King cannot Dispense with a Statute.

Now by this Statute that we are upon, it is Enacted, that every Officer shall take the Oaths, that every Person that does neglect it, shall be disabled to hold the said Office, now this Act does not work upon the Taking, but upon the Holding, and if such Conditions be not performed, he is thereby rendred incapable to hold his Office, and the King can never Enable a Man whom the Law hath Disabled, *3^o Inst. 154.* But I foresee the Case in *12 Cook 18.* will be objected against me, where it is said, that no Act of Parliament can bind the King from any Prerogative which is solely and inseparably annexed to his Person, but that he may Dispense with it by a *Non Obstante*, and the Book doth instance in the Case of Sheriffs upon the Statute *23 Henry 6.* which does Enact, that all Patents made or to be made of any Office of a Sheriff, &c. for term of years &c. within any County of *England*, &c. and shall forfeit 200 Pound, yet saies that Book, the King may Dispense with that Statute, and Cites *2 Henry 7. 66.* to be there so adjudged by all the Judges of *England*, and that this is the only Authority that seems to countenance this Case, but this is the Opinion only of my Lord *Cook*, for the Book which he Cites and depends upon, was never adjudged, as appears by *Brook 5. pt. 45. 109.* and what was said in that Case, was only said by one Judge, and never judicially determined, nor so much as spoken to by any other Judge, there-

fore the foundation that my Lord Cook has laid failing, the Superstructure must needs fall, and so with Submission, that single Opinion in 12 Cook, folio 18. is not Law; but admitting the Case to be Law, that can be no rule to guide this Case by, for that Statute was made, rather to deprive the King of his Power of making Sheriffs, and so consequently commanding his Sheriffs not to serve him, than to Disable the Subject, and thereby restraining the King's Prerogative, which is so inherent in him; but by the Statute 25 Car. 2. 2. the Prerogative of the King is not touched, for the King may grant the Office to any of his Subjects, and it is only a direction to the Subject to qualify himself for the King's Service, and if he be incapable to serve the King, 'tis through his own fault and neglect, and may be punishable for the same, as in Case of Sir John Reade in 27 and 28. Car. 2. in the Exchequer, he was made and Sworn Sheriff of *Hartfordshire*, and neglected to take the Oaths according to this Statute, by reason of which the Office became void, and afterwards there was an Information Exhibited against him upon this Statute we are now upon, for neglecting to take the said Oaths, and executing his Office, and upon this Convicted and Fined, and the Court was of Opinion that no Subject could put himself out of a Capacity to serve the King, but for so doing he is punishable, and in the Law of the Sheriffs the Dispensation is in the Patents, but in our Case the Dispensation is after the Patent, and so a difference between the two Cases: And for these Reasons, I pray your Lordships Judgment for the Plaintiff.

Arguments for the Defendant.

Sir Tho. Powis the King's Solicitor, Argued for the Defendant.

1. Point.

And as to the first Point, that supposing the Defendant ought to have pleaded the Dispensation to the Indictment, it does not appear by this Record, but that he did; for the Declaration is that he was *Legitime Modo Convictus*, and does not say whether he Pleaded not Guilty, or how he Pleaded, and for any thing that appears, he did plead it against the King, yet he may be admitted to plead it against the Plaintiff who is a Stranger.

2/y.

If they stand upon this as an Estopple, they ought to have relied upon it, and replied, that he had the Dispensation at the time of the Indictment, and refused to plead it, for he that pleads an Estopple must rely

rely upon it, as the Authorities are which treat of Estopples, and therefore as to the first point I think, with a submission, we have very well pleaded the Pardon and Dispensation in Bar of the Action.

As to the second point, whether the King can Dispense with the Statute or no? I humbly conceive, with Submission, the King may very well dispense with the Statute; 'tis admitted that the King may in many Cases dispense with an Act of Parliament, and let us consider why not this? It's well observed in 2^o. Insti. 496. that the Kings Prerogative is as much the Law of *England* as any other Law whatsoever; and the King may upon any Cause moving him in respect of time, place, or person, by a *Non Obstante* dispense with any particular Person, and that he shall not incur the penalty of the Statute. 7. *Cooke* 36. 37. *Vaughan* 347. 333. 1^o. *Rushworth*, 472. 473. there *Glanvill* in his Argument doth admit a power in the King to Dispense with *Penal Laws*, and yet he was no friend to the Prerogative. Though the Consent of the Lords and Commons be requisite to the making of the Act of Parliament, yet it is the King that gives the Sanctions to the said Laws, and most of the Antient Statutes began in form of Charters, as it appears in 8. *Cooke* 19. and the Intents and meanings of Acts of Parliament are every day by the Judges extended and changed, according to a better Rule of Reason and Justice than the words will bear, *Hobart* 229. and the Judges have an authority over the Statute-Laws, to mold them according to the truest and best Sense. *Hobart* 346. and Statutes which have been made against common Right, have been construed void. 8^o. *Cooke* 118.

There is a Distinction taken in our Books between Malum in se, and Malum prohibitum.

The former the King cannot Dispense with, the latter he may; as where the Statute generally prohibits any thing upon a penalty, which was Lawful before, (the Subject receiving no injury by such a Dispensation) the King there may Dispense with such an Act. *Vaughan* 343. *Dyer* 5. 2. The King granted a License to carry Bell metal out of the Realm, notwithstanding the Statute, *Dyer* 54. It was Enacted by Statute 4. *Hobart* 9. that none should convey Wine into *England* out of *Gascoign*, but in English Ship; and the King granted a License to a Man, that he, his Deputies, and Factors might convey, &c. in any Ship, notwithstanding the Statute, 28. *Cooke* 32. *Vaughan* 352, 353. 354. Now to apply the Cases to the Case in question, this is *Malum Prohibiter*, whether is the Dispensation any Damage to the Subject, if it were any wrong, it were to the King himself, and sure the King may very well Dispense with that which only relates to himself.

I must distinguish between those Acts of Parliament which concern Property, and those which concern Government; Acts of Parliament which concern Property, the King cannot Dispense with; but those which concern Government he may; and this for the great Inconveniencies which may happen, or Urgencies of State which may force him to it, and those un-foreseen at the time of making the Law; for it may happen by a vicissitude of times those Laws that were made for the preservation of Government, should turn to the destruction of it, if the King could not Dispense with them.

The Common Law in some Cases does very much respect the Prerogative, That it leaves the private Interest of the Subject unregarded, and the King may Dig in any of his Subjects Land for Saltpeter to make Gunpowder; now this Statute 25th Car. 2^o. was made to diminish the Kings Prerogative, but to secure him from his Enemies, and for the preservation of the Government; and the King is best Judge what will be most for his own security, and the Governments preservation. No Act of Parliament can discharge the Subject from his Allegiance which he owes to the King, every one is bound by his Allegiance to serve his Prince when he shall be required. Therefore no Act of Parliament can disable any man to serve the King. But they object, that this Act doth make no one incapable, but at his own Election.

If this were so, it would be in the Election of some or all the Subjects to incapacitate themselves to serve the King, and the King would be unserved, for if it were not in the power of the King to force the Subject, he would not (it may be not) be served at all; as in the Case of Sir John Read, Cited by the other side; he neglected to take the Oaths, and thereby the Office became void; so that the next Elected might refuse, and the next; in the mean time the King's Service lies neglected, and no business of the County can proceed for want of a Sheriff. To pardon Murther, is a Prerogative solely and inseparably incident to the King, and may Dispense with Statutes restraining it, 12^o, Cook 18. He may Dispense with *non residente*, Hobart 146. 3^o. Institute. 339. In 3. Insti. the Lord Cook speaking of Acts of Parliament that were made to restrain the King's power of pardoning Murther, says, that such Acts are good for Kings to follow, but not binding. Cook 18, 19. There are several Statutes cited, with which the King by his Prerogative may Dispense, as the Statute 36. Hen. 6. which does Enact, that no Man shall be Sheriff of one County two years together. Yet it was adjudged by all the Judges of England, says that Book, that the King may dispense with it; the Statute of 4^o. of Hen. 4^o. 31. that no *Welshman* shall be Justice, or other Officer whatsoever in any part of *Wales*; and yet the King may Dispense with

with it; the Statute 8^o. *Rich.* 22. and 33. *Henry* 8. 24. do Enact, that none shall be Justice of the Assize in the County where he was born, and yet the King with a Special *non Obstante* may Dispense with that Statute; and in *Plowden*, 502. 13. the King may grant to a Man to be an Escheator for Life notwithstanding that Statute.

To answer the Statutes which have been Cited, which the King cannot Dispense with. I say as to the Statutes of Simony and Usury, the King cannot Dispense with them, but what is that to this matter in hand? for there is no restriction of the Subjects service, but the King may have the benefit notwithstanding. Then as to the Statute 5. *Ed.* 6. 16. against Buying and Selling of Judicial Offices, of which Statute there is a Clause in the 1st. Instit. 134. That the King may not Dispense with that Statute. There is a difference between that Statute and this, for that does Enact, that if any person shall bargain and sell any Office, &c. shall lose the Office, &c. and all such Bargains and Contracts shall be void, and that he that shall give any Sum of Money, &c. for any such Office &c. shall be a disabled person in Law, to Have, Occupy, or Enjoy the said Office, &c.

Now the Statute doth disable the party upon doing such an Act, to take the Office, for the making the bargain is prior to taking the Office, and thereby he is disabled to take it, so that he can never have the Office legally vested on him, if the King cannot Dispense with a Conditional Subsequent, and so that does not come near this. And for this Reason I humbly pray Judgment for the Defendant.

Then the Lord Chief Justice spake to this Effect.

Ch. Justice. This is a Case of great Consequence, but of as little Difficulty as ever any Case was, that raised so great an Expectation, for if the King cannot Dispense with this Statute, he cannot Dispense with any Penal Law whatsoever.

As to the first point, whether he shall be admitted to plead this 1. Point. Dispensation, and Pardon to this Action of Debt (having not pleaded it to the Indictment) and I think he may, for this Court shall not be bound by the finding of the Jury below, for he (for any thing that does appear) did plead it there, and the Jury might have gone against the direction of the Court, yet that shall not Conclude us; but if the party has good Matter to discharge himself, we may shew it; as if a man be Convicted of an Assault and Battery against the Defendant, the Plaintiff may give the former Conviction in Evidence, but yet he must also prove the Battery, or else he shall not recover.

And this being an Estopple, it shall not bind, because the Plaintiff was not Party to the first Suit.

2. Point.

As to the second Point, whether the King can Dispense with the Act or no, I think it a question of little difficulty; there is no Law whatsoever but may be Dispensed with by the Supream Law-Giver; as the Laws of God may be Dispensed with by God himself; as it appears by God's Command to *Abraham*, to offer up his Son *Isaac*; so likewise the Law of Man may be dispensed by the Legislator, for a Law may either be too wide or too narrow, and there may be many Cases which may be out of the conveniencies which did endure the Law to be made, for it is impossible for the wisest Law-Maker to foresee all the Cases that may be or are to be Remedied, and therefore there must be a Power somewhere able to Dispense with these Laws. But as to the Case of Simony that is objected by the other side, that is against the Law of God, and a special Offence, and therefore *Malum in se*, which I do agree the King cannot Dispense with the Act. And as to the Cases of Usury and Non-Residence, those Cases do come in under that Rule, that the King cannot Dispense with them, because the Subject has a benefit by them; for in case of Usury the Bond is made void by the Statute, and therefore if the King should Dispense with it, the Subject would lose the Benefit of the avoiding the Bond. And as to the Cases of buying and selling of Offices, which are objected, there is no need of resolving, whether the King could Dispense with that Statute or no, because the Party was disabled to take any such Office by the Contract, and the Disability was attacked by force before the Office was vested, so that the King could not remove the Disability: and so I do agree it would have been in this Case, if the Defendant had by his neglect or refusal to take the Oaths, rendered himself incapable before he had taken the King's Dispensation, for the King's Dispensation coming before the Disability attacked, it does prevent it.

The Case of the Sheriff is much a stranger Case than this, and comes up to it in every particular, for that Statute doth disable the Party to Take, and the King to Grant, and there is also a clause in that Statute which saies, that the Patent shall be void, notwithstanding any *Non Obstante* to the contrary, and there is a penalty of 200 pound like to our case, and yet by the Opinion of all the Judges of *England*, the King has a power of Dispensing with that Statute, yet that Statute does expressly say, the King shall not Dispense with it by a *Non Obstante*; so if an Act of Parliament had a clause in it that it should never be repealed, yet without question, the same power that made it, may repeal it. Besides that Statute makes the Patents void at the time of granting them, but by this Statute, the Patents are good at the time of granting them, and continue so till the neglect to take the Oaths, for doing of which the Patentee has three Months time; and if the case of

of the Sheriff be Law, as it hath been taken ever since *Hen. 7th's* time, and is cited for good Law in many of our Books; and never till now questioned, for the common course and experience have been according to it, then I defie all the World to shew me any material difference between that and this, only that this is the stranger case of the two in many particulars. But because the case has been denyed by the Plaintiff's Counsel, it does concern us to take the Opinion of our Brethren, it being a matter of so great consequence in the Circuits; for if it be not Law, then there are some Sheriffs that be not lawful, and so have not power to return the Juries, and then we have no power to try and give Judgment upon any Offenders; and it also concerns us who goe into our Countries to take Advice of it, for if that case is not Law, our Patents which are *Non Obstante's* to 23 *Henry 8. 24.* may not be good, and so we have no Authorities to go the Circuits, and therefore I will ask the Opinion of all the Judges as well in that case as this.

On Monday the 21 of *June*, after having consulted with all the Judges, his Lordship delivered their Opinions in open Court, to this effect :

Upon the Arguments of this Case it did appear to us to be very plain, but yet for the better Satisfaction of all People, both this Case, and that of the Sheriffs, were put by me to all the rest of the Judges, and after some conference, ten of us did agree, that the Case of the Sheriff was good Law: But they all declared there was no difference between that and this; my Brother Powel at first doubted, but after concurred with us in Opinion: But my Brother Streete yet continues his Opinion, that the King cannot Dispense with that Statute, but there being the Opinion of eleven Judges against one single Judge, We may very well declare the King may lawfully Dispense with that Statute.

And we go upon these grounds,

- I. That the Kings of *England* are Sovereign Princes.
- II. That the Laws of *England* are the King's Laws.
- III. That it is an inseparable Prerogative in the King, to Dispense with Penal Laws upon necessity and urgent occasions.
- IV. That the King is Sole Judge in that necessity.
- V. That this is not in trust given to the King, but 'tis the Ancient Remains of the Crown, which never was nor can be taken away from him.

Querens nihil capiat per Billam.

FINIS.